

**SHEIKH KHALED JASSEM MOHAMMAD
JASSEM AL-THANI**

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v.

MERBOK HILIR BHD

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HIGH COURT MALAYA, PULAU PINANG
CHEW SOO HO JC
[CIVIL SUIT NO: 22-616-2006]
14 MARCH 2012

CIVIL PROCEDURE: *Amendment - Statement of claim - Amendment to plaintiff's name - Whether parties aware of actual status of plaintiff - Whether there was element of surprise - Whether barred by limitation - Whether amendment would turn suit to a suit of another and inconsistent character - Whether justice of case demanded amendment be allowed*

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The plaintiff in this action sought to amend: (i) the name of the plaintiff in the title of the suit from "Petroserv General Trading Establishment" to "Sheikh Khaled bin Jassem bin Mohammad Jassem Al-Thani Berniaga Sebagai Petroserv General Trading Establishment"; and (ii) para. 1 of the statement of claim by deleting the words "sebuah syarikat yang diperbadankan di Doha, Qatar" and substituting it with "seorang individu yang berniaga di bawah nama Petroserv General Trading Establishment". The defendant, in objecting to the amendment, alleged that the amendment was prejudicial to them and that the amendment was barred by limitation.

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Held (allowing application for amendment):

- (1) Based on the documents, it was clear that the amendment sought was a mere technical or procedural amendment as the parties had had the earlier advantage of the documents to be aware of the actual status of the plaintiff especially from the legal commercial licence issued by the relevant authority in Dubai, UAE. There was no element of surprise and therefore the amendment was *bona fide*. Hence, there was no prejudice against the defendant. (para 3)
- (2) There was no change of the cause of action with all the facts and all the remedies remaining the same as a consequence of the amendment. The court had the power to grant the amendment after the expiry of the limitation period in the

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- A circumstances of this case when the amendment would not in effect turn the suit into a suit of another and inconsistent character by merely adding the name of the plaintiff. (para 6)
- B (3) With the limitation period having set in, the plaintiff could not, now, withdraw the suit with liberty to file afresh. Hence, justice of the case demanded that the amendment be allowed because grave injustice will be caused to the plaintiff if it was disallowed. The application was in compliance with the requirements enunciated by the Federal Court in the case of
- C *Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors* and the application ought to be allowed in line with the justice of the case. To proceed with the trial without the amendment would be a futile exercise and a waste of judicial time when the rightful claimant was not named as the plaintiff. (para 7)
- D **Case(s) referred to:**
Dato' Tan Heng Chew v. Tan Kim Hor & Ors [2008] 7 CLJ 776 HC (**refd**)
Kam Hoy Trading v. Kam Fatt Tin Mine [1963] 1 LNS 51 HC (**refd**)
Wee Tiang Kheng & Ors v. Ngu Nii Soon & Ors [1989] 1 CLJ 267; [1989] 2 CLJ (Rep) 639 HC (**refd**)
- E *Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 FC (**refd**)
- Legislation referred to:**
Rules of High Court 1980, O. 14A, O. 20
- F *For the plaintiff - Simon Hue Fook Chuan (V Vanaranei Vadiveloo with him); M/s Simon Hue & Assocs*
For the defendant - Karen Lim (Shareen Abd Manan with her); M/s Presgrave & Matthews
- G *Reported by S Barathi*

JUDGMENT

Chew Soo Ho JC:

The Oral Application

- I [1] This appeal arose from an oral application by the plaintiff to amend the title and para. 1 of the statement of claim in the course of the trial on 14 March 2012 during the examination-in-chief of the first and sole witness for the plaintiff. The amendment is on the name of the plaintiff in the title of the suit from 'Petrosery

General Trading Establishment' to "Sheikh Khaled bin Jassem bin Mohammad Jassem Al-Thani berniaga sebagai Petrosery General Trading Establishment" and in para. 1 of the statement of claim by deleting the words "sebuah syarikat yang diperbadankan di Doha, Qatar" and substituting it with "seorang individu yang berniaga di bawah nama Petrosery General Trading Establishment". This amendment is necessary as a firm cannot sue in its own name although it may be sued in such name. It must therefore be sued in the name of the sole proprietor of the firm; see *Wee Tiang Kheng & Ors v. Ngu Nii Soon & Ors* [1989] 1 CLJ 267; [1989] 2 CLJ (Rep) 639. The main ground of objection from the defendant is that the amendment, if allowed, will render their appeal against their O. 14A application which had been dismissed by the court, nugatory or defeat their appeal based on the pleadings. In brief, the defendant is alleging that the amendment is prejudicial to them. It was also contended that such amendment is after the expiry of the limitation period.

Findings Of The Court

[2] Order 20 of the Rules of High Court 1980 (RHC) gives the court a discretion to allow leave to amend pleadings which must of course be exercised judicially (see *Kam Hoy Trading v. Kam Fatt Tin Mine* [1963] 1 LNS 51): per Mohd Azmi FCJ in *Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 where the Federal Court laid down the cardinal principles of law pertaining to amendment of pleadings as follows:

Three basic questions should be considered to determine whether injustice would or would not result:

- (1) whether the application is *bona fide*;
- (2) whether prejudice caused to the other side can be compensated by costs; and
- (3) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character.

[3] From the documentary evidence before the court as contained in the common bundle of documents marked as bundle C, documents such as the Commercial Licence No. 222335, the Merchant's Register Certificate in Commercial Registry, both were issued by the Department of Economic Development Government

- A of Dubai, United Arab Emirates in respect of the trade name of Petroseriy General Trading Est. (bundle C pp. 1-6) and the Commercial Licence No. 243959-(bundle C pp. 9-11) in respect of Petroseriy General Trading Est. (Br) issued by the same authority, the licence owner is categorically stated as “Sheikh
- B Khaled bin Jassem bin Mohammad Jassem Al-Thani” and “legal type” of the two trade names “Petroseriy General Trading Est.” and “Petroseriy General Trading Est. (Br)”, its branch, are clearly stated as “individual establishment”. In addition, in the power of attorney dated 26 September 2011 enclosed in the same common
- C bundle of documents, ie, bundle C at pp. 15 - 17 where Sheikh Khaled was the donor and Mr. John Frederick Keen was the donee, it was vividly stated that Petroseriy General Trading Est. and Petroseriy General Trading Est (Branch) are his (Sheikh Khaled’s) companies when he said explicitly “my company
- D Petroseriy General Trading Est.” and “my branch company, Petroseriy General Trading Est. (branch)”. This bundle C had been filed officially in court on 19 December 2011 *vide* its *praecipe* date which means that the latest by this date of 19 December 2011, the clear fact that both Petroseriy General Trading Est. which was
- E cited as the name of the plaintiff initially and Petroseriy Generally Trading Est (Br) were known to both parties that they belonged to the licence holder named Sheikh Khaled bin Jassem bin Muhammad Jassem Al-Thani, an individual, who should rightfully be named as the plaintiff. Since this is a known fact well before
- F the trial which commenced only on 14 February 2012, the amendment sought on 14 March 2012 scheduled for the continued hearing of this suit, to this court, is no surprise to the defendant. I agree with the submission by the plaintiff that such amendment sought was a mere technical or procedural amendment
- G as the parties had the earlier advantage of the documents to be aware of the actual status of the plaintiff especially from the legal commercial licence issued by the relevant authority in Dubai, UAE. There is no element of surprise. Thus, this court holds that such amendment is *bona fide*. Since the amendment was merely adding
- H the name of Sheikh Khaled bin Jassem bin Mohammad Jassem Al-Thani trading as Petroseriy Gerreral Trading Establishment, there is no change of the cause of action as all the facts are the same so are all the relief sought. I also do not find that there is prejudice against the defendant who knew of such fact months
- I before the trial from the documents available in the said bundle C, *inter alia*. It could probably be argued that such application was asked for only during trial. I am of the view that that itself may

not be prejudicial when the relevant fact upon which the plaintiff had relied on to apply for amendment was available and known to all parties well before the commencement of the trial bearing in mind that the party is permitted to amend the pleadings at any stage of the proceedings with the leave of the court. If it is contended that the delay had caused prejudice to the defendant, I am of the view that this can certainly be met by an order for costs.

[4] Defendant's main argument is that this amendment, if allowed, would render their appeal against the dismissal of their O. 14A Rules of the High Court 1980 application to the Court of Appeal nugatory or prejudicial. I disagree for the simple reason that the decision to allow or disallow this amendment does not bar the defendant from proceeding with their said appeal to the Court of Appeal simply because the decision of the Court of Appeal is binding on this court and if the defendant is able to succeed in that appeal, the decision of the Court of Appeal will certainly override the decision of this court even if the amendment is allowed. In that sense, when the defendant's appeal process is not in whatever way being curtailed by the decision relating to this amendment of this court and the defendant can nevertheless proceed as usual to ventilate their appeal, I find that this amendment does not prejudice the defendant as contended.

[5] On the further contention by the defendant that the amendment, if allowed, would be granted after the expiry of the limitation period of the suit, in this respect, learned counsel for the plaintiff had cited the case of *Dato' Tan Heng Chew v. Tan Kim Hor & Ors* [2008] 7 CLJ 776 where His Lordship Abdul Malik Ishak J (now JCA) has held, *inter alia*, that:

Held:

- (4) The Court has the power under the rule to grant an amendment after the expiry of the limitation period notwithstanding the fact that the effect of such an amendment will be to add or substitute a new cause of action subject always to the very important caveat, namely, that the new cause of action must arise out of the same or substantially the same facts as the cause of action in respect of which relief had already been claimed.

[6] In our case, there is no change of the cause of action with all the facts and all remedies remaining the same as a consequence of this amendment. I agree that this court has the power to grant

- A the amendment after the expiry of the limitation period in the circumstances of this case when the amendment would not in effect turn the suit from one character into a suit of another and inconsistent character by merely adding the name of the plaintiff to include Sheikh Khaled bin Jassem bin Mohammad Jassem Al-Thani.
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- [7] Having considered the application and all facts advanced including all submissions by both parties, I hold that this application has complied with the requirements as enunciated by the Federal Court in *Yamaha Motor's* case (*supra*) that such application ought to be allowed by this court in line with the justice of the case. I say so that justice of the case demands that this amendment be allowed because grave injustice will be caused to the plaintiff if it is disallowed as the plaintiff cannot withdraw the suit with liberty to file afresh with the limitation period having set in and to proceed with the trial without the amendment would be a futile exercise and a waste of judicial time when the rightful claimant is not named as the plaintiff. This court cannot allow injustice to supercede any technical error.
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- E [8] For the above reasons, the aforesaid amendments as applied for by the plaintiff are allowed and the continuation of the trial was proceeded on.

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